

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance for Law	)	ET Docket No. 04-295
Enforcement Act and Broadband Access and	)	
Services	)	RM-10865
	)	

**FIRST REPORT AND ORDER  
AND  
FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: August 5, 2005**

**Released: September 23, 2005**

**Comment Date: (30 Days After Federal Register Publication of this Notice)**

**Reply Comment Date: (60 Days After Federal Register Publication of this Notice)**

By the Commission: Chairman Martin, Commissioners Abernathy, Copps, and Adelstein issuing separate statements.

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**I. INTRODUCTION**

1. In this Order, we conclude that the Communications Assistance for Law Enforcement Act (CALEA) applies to facilities-based broadband Internet access providers and providers of interconnected voice over Internet Protocol (VoIP) service. This Order is the first critical step to apply CALEA obligations to new technologies and services that are increasingly relied upon by the American public to meet their communications needs.

2. Our action today is responsive to a joint petition for expedited rulemaking filed by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, DOJ) in March 2004.<sup>1</sup> In its petition, DOJ asked the Commission to declare that broadband Internet access services and VoIP services are covered by CALEA.<sup>2</sup> Today we respond to that request. This action strikes an appropriate balance between fostering competitive broadband and advanced services deployment and technological innovation on one hand, and meeting the needs of the law enforcement community on the other.

3. In the coming months, we will release another order that will address separate questions regarding the assistance capabilities required of the providers covered by today's Order pursuant to section 103 of CALEA.<sup>3</sup> This subsequent order will include other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement. We take this two-step approach to focus debate on the implementation rather than the applicability of CALEA to providers of broadband Internet access services and VoIP services. By clarifying the applicability of CALEA to these providers now, we enable them to begin planning to incorporate CALEA compliance into their operations. We also ensure that the appropriate parties become involved in ongoing discussions among the Commission, law enforcement, and industry representatives to develop standards for CALEA capabilities and compliance. Because we acknowledge that providers need a reasonable amount of time to come into compliance with all relevant CALEA requirements, we establish a deadline of 18 months from the effective date of this Order, by which time newly covered entities and providers of newly covered services must be in full compliance.

## II. BACKGROUND

4. In response to concerns that emerging technologies such as digital and wireless communications were making it increasingly difficult for law enforcement agencies to execute authorized surveillance, Congress enacted CALEA on October 25, 1994.<sup>4</sup> CALEA was intended to preserve the ability of law enforcement agencies to conduct electronic surveillance by requiring that telecommunications carriers and manufacturers of telecommunications equipment modify and design their equipment, facilities, and services to ensure that they have the necessary surveillance capabilities.<sup>5</sup> The Commission began its implementation of CALEA with the release of a Notice of Proposed Rulemaking in October 1997.<sup>6</sup> Since

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<sup>1</sup> Joint Petition for Expedited Rulemaking, RM-10865 (filed Mar. 10, 2004) (DOJ Petition).

<sup>2</sup> *Id.* at 15.

<sup>3</sup> 47 U.S.C. § 1002.

<sup>4</sup> Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

<sup>5</sup> 47 U.S.C. § 1002(a)(1)-(4). Jurisdiction to implement CALEA's provisions is shared by the Attorney General of the United States, who consults with state and local law enforcement agencies, and the Federal Communications Commission. Effective implementation of CALEA's provisions relies to a large extent on shared responsibility among these governmental agencies and the service providers and manufacturers subject to the law's requirements.

<sup>6</sup> *Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking, CC Docket No. 97-213, 13 FCC Rcd 3149 (1997) (NPRM).

that time, the Commission has taken several actions and released numerous orders implementing CALEA's requirements.<sup>7</sup>

5. *DOJ Petition.* On March 10, 2004, DOJ filed a petition asking the Commission to declare that broadband Internet access services and VoIP services are covered by CALEA.<sup>8</sup> The Petition also requested that the Commission initiate a rulemaking proceeding to resolve, on an expedited basis, various outstanding issues associated with the implementation of CALEA.<sup>9</sup> The Commission declined to issue a declaratory ruling, finding instead that it was necessary to compile a more complete record on the factual and legal issues surrounding the applicability of CALEA to broadband Internet access services and VoIP services, and thus issued a Notice of Proposed Rulemaking.<sup>10</sup>

6. *CALEA Notice of Proposed Rulemaking.* On August 9, 2004, the Commission initiated this proceeding both to undertake a comprehensive and thorough examination of the appropriate legal and policy framework of CALEA, and to respond to DOJ's Petition asking the Commission to seek comment on the various outstanding issues associated with the implementation of CALEA, including the potential applicability of CALEA to broadband Internet access services and VoIP services.<sup>11</sup> The *Notice* indicated that the Commission would analyze the applicability of CALEA to broadband Internet access services and VoIP services under section 102(8)(B)(ii), a provision of CALEA upon which the Commission had never before relied.<sup>12</sup> That provision – the Substantial Replacement Provision (SRP) – requires the Commission to deem certain service providers to be telecommunications carriers for CALEA purposes<sup>13</sup> even when those providers are not telecommunications carriers under the Communications Act of 1934, as amended (Communications Act).<sup>14</sup> The *Notice* indicated that the Commission had never before exercised its section 102(8)(B)(ii) authority to identify additional entities that fall within CALEA's definition of "telecommunications carrier," and had never before solicited comment on the discrete components of that subsection.<sup>15</sup>

7. The *Notice* sought comment, among other things, on the Commission's tentative conclusions that: (1) Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than that of the Communications Act; (2) facilities-based providers of any type of broadband Internet access service are subject to CALEA; (3) "managed" VoIP services are subject to CALEA; and (4) the phrase "a replacement for a substantial portion of the local telephone exchange service" in section 102 of CALEA calls for assessing the replacement of any portion of an individual subscriber's functionality previously provided via "plain old telephone service" (POTS).<sup>16</sup>

### III. DISCUSSION

8. In this Order, we interpret the SRP to cover facilities-based broadband Internet access and interconnected VoIP. Our analysis below first interprets the SRP to establish a legal framework for assessing services under CALEA, explaining the basis for all statutory interpretations that inform this framework. Next, we apply this framework to providers of facilities-based broadband Internet access services and interconnected VoIP services. In each case, we find that these providers are subject to CALEA under the SRP. We then discuss the scope of our actions today and the relationship of these

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<sup>7</sup> See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No.04-295, RM-10865, 19 FCC Rcd 15676, 15678-91, paras. 5-29 (2004) (*Notice*) (providing a complete discussion of the history of the Commission's CALEA implementation actions and orders).

actions to the Commission's efforts to resolve a number of outstanding issues related to CALEA, such as assistance capability requirements, compliance, enforcement, identification of future services and entities subject to CALEA, and cost-related matters.

### A. Legal Framework

9. In this section, we explain how CALEA's SRP requires us to determine that some providers are subject to CALEA even if they are not telecommunications carriers as defined in the Communications Act.<sup>17</sup> We further explain the relationship between the SRP and CALEA's exclusion for information services.<sup>18</sup> Because the text of CALEA does not provide unambiguous direction, we consider the structure and history of the relevant provisions, including Congress's stated purposes, and interpret the

(continued from previous page)

<sup>8</sup> See *supra* n.1.

<sup>9</sup> DOJ Petition at iii-iv.

<sup>10</sup> Notice, 19 FCC Rcd at 15703, para. 47.

<sup>11</sup> *Id.* at 15677, para. 1.

<sup>12</sup> 47 U.S.C. § 1001(8)(B)(ii) (defining a "telecommunications carrier" as "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title").

<sup>13</sup> See Notice, 19 FCC Rcd at 15678, para. 7.

<sup>14</sup> 47 U.S.C. § 151 *et seq.* CALEA's definition of "telecommunications carrier" contains a number of subsections both including and excluding particular providers and services from its requirements. 47 U.S.C. § 1001(8); see also *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105 (2000) (*Second Report and Order*). The *Second Report and Order* stated that the legislative history of CALEA contains examples of the types of service providers subject to CALEA: "The definition of 'telecommunications carrier' includes such service providers as local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, providers of personal communications services, satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public." *Id.* at 7111, para. 10 (citing 140 Cong. Rec. H-10779 (daily ed. Oct. 7, 1994) (statement of Rep. Hyde)); see also H.R. Rep. No. 103-827(I), at 23, reprinted in 1994 U.S.C.A.N. 3489, 3500 (*House Report*). Prior to the Notice in the instant proceeding, the Commission relied exclusively on two subsections of section 102 to identify those entities subject to CALEA's requirements: section 102(8)(A) (Common Carrier Provision), which the Commission has interpreted to include those entities covered by the definition of a telecommunications carrier under the Communications Act, and section 102(8)(B)(i) (CMRS Provision), which includes any CMRS carrier, as defined in section 332 of the Communications Act.

<sup>15</sup> Notice, 19 FCC Rcd at 15697-98, para. 42. The initial CALEA NPRM asked commenters to identify any cases they believed warranted Commission action under section 102(8)(B)(ii) to the extent those commenters disagreed with the Commission's proposal in the NPRM to decline to exercise its discretion under section 102(8)(B)(ii) at that time. NPRM, 13 FCC Rcd at 3162, para. 18.

<sup>16</sup> Notice, 19 FCC Rcd at 15677, para. 1.

<sup>17</sup> As we have said, service providers that are telecommunications carriers under the Communications Act are telecommunications carriers under section 102(8)(A) of CALEA. See *id.* at 15695, para. 39 & nn.87-88.

<sup>18</sup> 47 U.S.C. § 1001(8).

statute in a manner that most faithfully implements Congress's intent. We conclude, as we indicated in the *Notice*, that the terms "telecommunications carrier" and "information services" in CALEA cannot be interpreted identically to the way those terms have been interpreted under the Communications Act in light of the statutory text as well as Congress's intent and purpose in enacting CALEA.<sup>19</sup>

### 1. CALEA Definition of "Telecommunications Carrier"

10. We affirm our tentative conclusion that Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than the similar definition of "telecommunications carrier" in the Communications Act.<sup>20</sup> Critically, while certain portions of the definition are the same in both statutes, CALEA's SRP "has no analogue" in the Communications Act,<sup>21</sup> thus rendering CALEA's definition of "telecommunications carrier" broader than that found in the Communications Act. The SRP directs the Commission to deem certain providers to be telecommunications carriers for CALEA purposes, whether or not they satisfy the definition of telecommunications carrier in sections 102(8)(A) and 102(8)(B)(i). The SRP reflects Congress's intent to "preserve the government's ability to . . . intercept communications that use advanced technologies such as digital or wireless transmission."<sup>22</sup> Under the SRP, a telecommunications carrier is:

a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA].<sup>23</sup>

11. The SRP contains three components, each of which must be satisfied before the Commission can deem a person or entity a telecommunications carrier for purposes of CALEA. We address each of these components in turn. First, the SRP requires that an entity be "engaged in providing wire or electronic communication switching or transmission service."<sup>24</sup> In the *Notice*, we interpreted the term "switching" in this phrase to include "routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along

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<sup>19</sup> *Notice*, 19 FCC Rcd at 15697-15706, paras. 41-50. In addition to the SRP, CALEA contains other clues that Congress intended different things in the different definitions. See *id.* at 15701-03, para. 46.

<sup>20</sup> *Id.* at 15697, para. 41; see also Verizon Comments at 4 ("[T]he CALEA definition of 'telecommunications carrier' is different from and broader than the Communications Act definition of that term and . . . whether a particular service falls within Title I or Title II [of the Communications Act] is independent of the applicability of CALEA to that service."). But see, e.g., EarthLink Comments at 8 (stating that the definitions of telecommunications carrier in the Communications Act and CALEA are functionally identical); I&P Comments at 30 (arguing that the differences between the CALEA and the Communications Act's definition are not and cannot be significant for purposes of this proceeding).

<sup>21</sup> Verizon Comments at 5.

<sup>22</sup> *House Report* at 3489.

<sup>23</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>24</sup> *Id.*

to their intended destinations.”<sup>25</sup> We affirm this reading of the statute, which has support in the record.<sup>26</sup> We disagree with commenters who claim that the term “switching” as used by Congress in 1994 did not contemplate routers and softswitches, and thus suggest that the interpretation of this term must forever be limited to the function as it was commonly understood in 1994, namely circuit switching in the narrowband PSTN.<sup>27</sup> Our decision today is reinforced by judicial precedent that has found CALEA to apply to certain packet-switched services.<sup>28</sup> Moreover, limiting the interpretation of “switching” to circuit-switched technology would effectively eliminate any ability the Commission may have to extend CALEA obligations under the SRP to service providers using advanced digital technologies, in direct contravention of CALEA’s stated purpose.<sup>29</sup> Our interpretation of the term “switching” is consistent with the Commission’s prior recognition that CALEA is a technology-neutral statute that focuses on function, not technology.<sup>30</sup> In today’s technological environment, where IP-based broadband networks are rapidly replacing the legacy narrowband circuit-switched network, various types of packet-mode equipment are increasingly being deployed to “originate, terminate, or direct communications” to their intended destinations.<sup>31</sup> Interpreting CALEA’s inclusion of the word “switching” to describe a function that Congress intended to be covered – regardless of the specific technology employed to perform that function – is, in our view, the interpretation most consistent with the purpose of the statute.

12. Second, the SRP requires that the service provided be “a replacement for a substantial portion of the local telephone exchange service.”<sup>32</sup> We conclude that this requirement is satisfied if a service replaces any significant part of an individual subscriber’s functionality previously provided via circuit-switched local telephone exchange service.<sup>33</sup> This interpretation of an ambiguous statutory provision is

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<sup>25</sup> Notice, 19 FCC Rcd at 15698-99, para. 43.

<sup>26</sup> See, e.g., DOJ Comments at 8-9; Verizon Reply at 4.

<sup>27</sup> See, e.g., EFF Comments at 16-17 & n.72; EDUCAUSE Comments at 8; I&P Comments at 32-34; I&P Reply at 24.

<sup>28</sup> *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 464-66 (D.C. Cir. 2000).

<sup>29</sup> *House Report*, 1994 U.S.C.C.A.N. at 3489-90.

<sup>30</sup> Notice, 19 FCC Rcd at 15692, para. 33.

<sup>31</sup> 47 U.S.C. § 1002(a); see also *House Report*, 1994 U.S.C.C.A.N. at 3498.

<sup>32</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>33</sup> In the Notice, we described different ways to interpret the word “replacement” in the SRP: it can be equated with the economic concept of “substitutability,” or it can be used to mean a functional substitute, *i.e.*, a service that provides the subscriber a functionality encompassed within local telephone exchange service. See Notice, 19 FCC Rcd at 15699-15701, para. 44 & n.113. We asked commenters whether they agreed with our understanding that Congress contemplated the latter meaning of the word “replacement” when using that word in the SRP. The record confirms our understanding. See, e.g., Verizon Reply at 4-5. We clarify, however, that our interpretation of “replacement” is solely for purposes of applying the SRP. This interpretation has no bearing whatsoever on any Commission efforts to implement and fulfill its separate objectives and mandates under the Communications Act. To be clear, we in no way suggest that services we may find to be “replacements” under the SRP are themselves “local telephone exchange services” under the Communications Act. We emphasize in particular that nothing in this Order is intended to supersede or prejudice any Commission interpretation of section 332(c)(3) of the Communications Act. See CTIA Comments at 5.

most consistent with the language of section 102(8)(B)(ii),<sup>34</sup> the express purpose of CALEA, and its legislative history. Congress did not enact language consistent with an interpretation offered by some commenters that would require the widespread use of a service before the SRP may be triggered. Instead, the SRP's phrase "substantial portion of the local telephone exchange service" indicates that the appropriate test is a functional one. It is triggered when a service replaces a portion of traditional telephone service, *i.e.*, all or some of the components, or functions, of the service. Because the statutory phrase includes the word "substantial," we will require the functions being replaced to be a significant or substantial function of traditional telephone service.<sup>35</sup>

13. As we explained in the *Notice*, the legacy local telephone exchange network served two distinct purposes at the time CALEA was enacted: it provided POTS, which enabled customers to make telephone calls to other customers within a defined local service area;<sup>36</sup> and it was the primary, if not the only, conduit (*i.e.*, transmission facility) used to access many non-local exchange services such as long distance services,<sup>37</sup> enhanced services,<sup>38</sup> and the Internet.<sup>39</sup> The legislative history indicates that Congress intended CALEA to cover both the ability to "make, receive and direct calls"<sup>40</sup> (*i.e.*, the POTS functionality) and the transmission facilities that provide access to other services (*i.e.*, the access conduit functionality).<sup>41</sup> In 1994, this transmission function was commonly provided by dial-up Internet access, which shows that Congress did not mean to limit CALEA's scope to voice service alone.<sup>42</sup> We therefore

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<sup>34</sup> 47 U.S.C. § 1001(8)(B)(ii) (referring to "replacement for a substantial portion of the . . . service") (emphasis added); see also DOJ Comments at 12-13 ("Congress could have used a phrase indicating that the test should refer to the widespread use of a service . . . , but it did not.").

<sup>35</sup> See DOJ Comments at 14 ("The Commission should conclude that a service replaces not just 'any portion of an individual subscriber's functionality previously provided via POTS' but in fact replaces a *substantial* portion of local telephone exchange service."); see also, *e.g.*, BellSouth Comments at 8 (stating that "for purposes of CALEA, 'a replacement for a substantial portion of the local exchange service a service' must be capable of replacing all (or at least a majority) of the functionalities of local exchange service, including, for example, the ability to make local voice calls, access to 911, and access to long distance service"); EFF Comments at 10 (arguing that the *Notice* "reads 'substantial' out of the clause, finding it means 'any' portion"); Global Crossing Comments at 7 (arguing that "replacing the word 'substantial' with the word 'any' is not a permissible construction of the statute because the term substantial portion sets a high bar that requires the Commission to set some limiting standard").

<sup>36</sup> See 47 U.S.C. § 153(47) (definition of "telephone exchange service").

<sup>37</sup> See 47 U.S.C. § 153(16) (definition of "exchange access").

<sup>38</sup> See generally *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (explaining how the local telephone exchange is used for accessing enhanced services).

<sup>39</sup> See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4870, para. 9 n.32 (2004).

<sup>40</sup> *House Report*, 1994 U.S.C.C.A.N. at 3503.

<sup>41</sup> *Id.* Congress articulated, consistent with its understanding of how CALEA would work, an expectation that law enforcement "will most likely intercept communications over the Internet at the same place it intercepts other electronic communications: at the carrier that provides access to the public switched telephone network." *Id.* at 3504.

<sup>42</sup> See *infra* Section III.B.

agree with DOJ that the language “substantial portion of the local telephone exchange service” includes both the POTS service and the transmission conduit functionality provided by local telephone exchange service in 1994.<sup>43</sup> Commenters have not persuaded us otherwise.

14. The SRP’s third component requires that the Commission find that “it is in the public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA]” once that entity has met the first and second components of the SRP.<sup>44</sup> We sought comment in the *Notice* on how to define the “public interest” for purposes of CALEA, as the statute does not explicitly define the term. We noted that the *House Report* specifically identified three factors for the Commission to consider, at a minimum, in making its public interest determination under the SRP: whether deeming an entity a telecommunications carrier would “promote competition, encourage the development of new technologies, and protect public safety and national security.”<sup>45</sup> Based on the record before us, we conclude that it is appropriate to rely primarily on these three factors when making our public interest determination for purposes of the SRP.<sup>46</sup> We find that consideration of these three factors balances the goals of competition and innovation with the needs of law enforcement.

## 2. CALEA Definition of “Information Services”

15. As we explained in the *Notice*, the treatment of information services under CALEA is different from the treatment such services have been afforded under the Communications Act.<sup>47</sup> In keeping with the legislative history of the Communications Act, the Commission interprets that Act’s definitions of “telecommunications service” and “information service” to be mutually exclusive.<sup>48</sup> Moreover, because the definition of “telecommunications service” focuses on the character of a provider’s “offering . . . to the public,”<sup>49</sup> the Commission has concluded that the classification of a particular service as a telecommunications service or an information services “turns on the nature of the functions that the end

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<sup>43</sup> See DOJ Comments at 14; DOJ Reply at 7.

<sup>44</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>45</sup> *House Report*, 1994 U.S.C.C.A.N at 3501.

<sup>46</sup> While we decline to identify any other specific public interest considerations at this time, we note that the *House Report* identified the above three factors as “at a minimum” considerations. As a result, the Commission has the discretion to identify and consider other factors as necessary when evaluating the applicability of the SRP to any new service or function in the future.

<sup>47</sup> *Notice*, 19 FCC Rcd at 15705-06, para. 50.

<sup>48</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11520, 11522-23, paras. 39, 43 (1998) (*Report to Congress*); see also *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*; *Universal Service Obligations of Broadband Providers*; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*; *Computer III Further Remand Proceedings*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, Report and Order, paras. 12-17 (rel. Sept. 23, 2005) (*Wireline Broadband Internet Access Services Order*) (describing this mutual exclusivity with respect to facilities-based wireline broadband Internet access services).

<sup>49</sup> 47 U.S.C. § 153(46).



user is offered.”<sup>50</sup> Additionally, the Communications Act’s definition of “telecommunications” “only includes transmissions that do not alter the form or content of the information sent,” a definition that the Commission has found to exclude Internet access services, which “alter the format of information through computer processing applications.”<sup>51</sup> For these reasons, the Commission has concluded that a single entity offering an integrated service combining basic telecommunications transmission with certain enhancements, specifically “capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” offers *only* an information service, and not a telecommunications service, for purposes of the Communications Act if the telecommunications and information services are sufficiently intertwined.<sup>52</sup> In other words, the Commission does not recognize the telecommunications component of an information service as a telecommunications service under the Communications Act.<sup>53</sup>

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<sup>50</sup> *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822-23, para. 38 (2002) (*Cable Modem Declaratory Ruling*).

<sup>51</sup> *Report to Congress*, 13 FCC Rcd at 11516-17, para. 33 (quoting *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9179-80, paras. 788-89 (1997)).

<sup>52</sup> *See id.* at 11520, para. 39. Consequently, these providers are not subject to the Communications Act’s Title II common carrier requirements with respect to the information service provided to the end user, even if that same service provider is providing the transmission component of the information service to the end user. Under the Commission’s *Computer Inquiry* rules, facilities-based telecommunications carriers that offer information services (previously termed “enhanced services” prior to the 1996 Act) are required to separate out the transmission capability underlying their information services and offer that transmission capability on a common carrier basis to other entities that desire to offer competing information services. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3036-40, paras. 33-42 (2002) (*Wireline Broadband NPRM*) (providing a detailed summary of the history and requirements of the *Computer Inquiry* regime). This unbundling requirement does not, however, change the classification of these providers under the Communications Act with respect to the end-to-end service; these providers are deemed to be information service providers. The Commission has eliminated all obligations stemming from the *Computer Inquiry* rules for facilities-based providers of wireline broadband Internet access service. *See Wireline Broadband Internet Access Services Order*, paras. 41-46; *see also Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4824-25, paras. 42-44 (declaring that Title II and common carrier regulations, including the *Computer Inquiry* rules, do not apply to cable modem service), *aff’d sub nom. National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (*NCTA v. Brand X*).

<sup>53</sup> *See, e.g., Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 420-28, paras. 97-114 (1980); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, No. 32321, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1620 (1992); *Teleconnect Company v. Bell Telephone Company of Penn.*, File No. E-88-83, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1629 (1995); *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22475-78, paras. 17-21 (1998). The Commission has recognized that an entity may be providing “telecommunications” under the Communications Act without providing a “telecommunications service.” *See, e.g., Wireline Broadband Internet Access Services Order*, para. 104. The Supreme Court has affirmed this interpretation of the Communications Act. *See NCTA v. Brand X*, slip op. at 16-21.

16. In contrast with the Communications Act, CALEA does not define or utilize the term “telecommunications service,” it does not adopt the Communications Act’s narrow definition of “telecommunications,” and it does not construct a definitional framework in which the regulatory treatment of an integrated service depends on its classification into one of two mutually exclusive categories, *i.e.*, telecommunications service or information service. As a result, structural and definitional features of the Communications Act that play a critical role in drawing the Act’s regulatory dividing line between telecommunications service and information service, and that undergird the Commission’s resulting classification of integrated broadband Internet access service as solely an information service for purposes of the Communications Act, are absent from CALEA. Those structural differences between the two statutes have significance, because “statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”<sup>54</sup> Unlike the Communications Act, CALEA’s “overall statutory scheme” does not require the Commission to classify an integrated service offering as solely a telecommunications service or solely an information service depending on “the nature of the functions that the end user is offered,” and thus the classification of broadband Internet access services under the Communications Act is not controlling under CALEA.

17. The text of the “information services” definition is entirely consistent with this interpretive approach. CALEA defines “information services” as the offering of a capability for manipulating and storing information “via telecommunications,”<sup>55</sup> but the statutory definition does not resolve the question whether the telecommunications functionality used to access that capability itself falls within the information service category. Under the Communications Act’s similar definition of information service, we have resolved that ambiguity by concluding that the telecommunications component of an integrated information service offering falls within the information service category, but that result is not compelled by the text of CALEA, and thus the Act leaves the Commission free to resolve the definitional ambiguity as appropriate in light of CALEA’s purposes and the public interest, without being bound by the approach followed under the Communications Act.

18. We also reach that same conclusion by a separate, and independent, route. CALEA excludes from its definition of telecommunications carrier “persons or entities insofar as they are engaged in providing information services,”<sup>56</sup> and the definition of information services in CALEA<sup>57</sup> is similar to

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<sup>54</sup> *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989).

<sup>55</sup> 47 U.S.C. § 1001(6)(A).

<sup>56</sup> 47 U.S.C. § 1001(8)(C)(i); *see also* 47 U.S.C. § 1002(b)(2)(A) (stating that CALEA’s capability requirements do not apply to information services). We refer to the former provision of CALEA as the Information Services Exclusion.

<sup>57</sup> 47 U.S.C. § 1001(6). CALEA provides that the term “information services”:

(A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and

(B) includes –

(i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(ii) electronic publishing; and

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the definition in the Communications Act. The SRP, however, adds a third category of services to the mix. A provider of communication switching or transmission service that is not a telecommunications service under the Communications Act is nonetheless deemed to be a telecommunications carrier under CALEA if the Commission finds that the service replaces a substantial portion of local telephone exchange service and it is in the public interest to treat the provider as a telecommunications carrier. To give significance to the SRP, this new category of services must include some aspects of services that may be "information services" under the Communications Act. An "irreconcilable tension" would occur if the Commission rendered Congress's deliberate extension of CALEA's requirements to providers satisfying the SRP insignificant by simply applying its Communications Act interpretation of "information services" to CALEA.<sup>58</sup> Consequently, to resolve that tension in a manner that the Commission determines best reflects Congressional intent under CALEA as well as the text of the statute, a service classified as an "information service" under the Communications Act may not, in all respects, be classified as an "information service" under CALEA.<sup>59</sup>

19. In addition to constituting the most reasonable construction of the statutory text, this conclusion is further bolstered by an examination of the legislative history. While CALEA's definition of "information services" does not incorporate any references to the Communications Act or the Commission's rules or contain any definition of "information service provider,"<sup>60</sup> the *House Report* frequently addresses or references "information services" and types of providers it understands to be information service providers. We believe these references provide relevant insight into Congress's intent regarding CALEA's definition of "information services," and strongly support a finding that the meaning of "information service" under CALEA does not match its meaning under the Communications Act.

20. The *House Report*'s discussion of information services and information service providers for CALEA purposes pertains *only* to the enhancements to the transmission capability underlying the service, that is, the computing capabilities that transform the service from a "telecommunications service" under the Communications Act and the corresponding Commission rules into an "information service."<sup>61</sup> For example, in discussing privacy concerns and the scope of CALEA, the *House Report* indicates that "electronic mail providers, on-line service providers, and Internet service providers are not subject to CALEA."<sup>62</sup> The *House Report* goes on to indicate, however, that while the storage of an e-mail message

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(iii) electronic messaging services; but

(C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

*Id.*

<sup>58</sup> Notice, 19 FCC Rcd at 15705-06, para. 50.

<sup>59</sup> *Id.*

<sup>60</sup> The definition of "information service," like the definitions of "telecommunications," "telecommunications service," and "telecommunications carrier," was not included in the Communications Act until 1996, after CALEA was enacted.

<sup>61</sup> See *supra* para. 15.

<sup>62</sup> *House Report*, 1994 U.S.C.C.A.N. at 3500. The Committee acknowledges the increasing use of the Internet for electronic communications, but focuses only on e-mail and electronic communications associated with transactional (continued . . .)

falls within CALEA's Information Services Exclusion, the *transmission* of an e-mail message is subject to CALEA.<sup>63</sup> Similarly, the *House Report* indicates that a portion of voice mail service is also covered by CALEA: "the 'redirection' of a voice mail message is covered by CALEA, while the storage of the message is not."<sup>64</sup>

21. If an information service for purposes of CALEA mirrored the definition and treatment of an information service under the Communications Act, CALEA would never have been able to reach the transmission of all e-mails or voice mails even when CALEA was enacted. Under the Communications Act, e-mail and voice mail services are both treated as single end-to-end information services, and their providers are classified as information service providers even with respect to the underlying transmission and switching component.<sup>65</sup> We therefore understand the legislative history of CALEA to show that when a single service comprises an information service component and a telecommunications component, Congress intended CALEA to apply to the telecommunications component. It follows, therefore, that because Congress intended CALEA to cover the transmission of information services, it must have intended that CALEA would continue to reach such services even when they are provided by new technologies.<sup>66</sup> We disagree with commenters who argue that we should interpret the statute to narrow the scope of services that are covered today to a more narrow group of services than those covered when CALEA was enacted, particularly in light of CALEA's stated purpose to preserve the government's ability to intercept communications that use advanced technologies.<sup>67</sup> In the face of this express purpose and the evidence contained in the legislative history of CALEA, we find it more rational to interpret "information services" under CALEA more narrowly than the Commission interprets that term in the Communications Act. The record supports this reading of CALEA.<sup>68</sup>

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relationships; no mention is made of a potential for use of the Internet as a voice communications medium, such as with VoIP services.

<sup>63</sup> *Id.* at 3503.

<sup>64</sup> *Id.* at 3500, 3503.

<sup>65</sup> *Report to Congress*, 13 FCC Rcd at 11536-39, paras. 75, 78.

<sup>66</sup> When CALEA was enacted, ISPs did not also provide the transmission access capability of Internet access.

<sup>67</sup> *House Report* at 3489.

<sup>68</sup> See, e.g., Verizon Comments at 4 (stating that "whether a particular service falls within Title I or Title II is independent of the applicability of CALEA to that service"); Spitzer Comments at 7 (stating that "it is entirely proper to find that a service is not an information service for the purposes of CALEA even if the Commission determines that it is an information service under the 1996 Act"); NCTA Reply at 3 (stating its "support for the Commission's view that the status of an entity as a telecommunications carrier or a service as an information service are different questions under CALEA and the Communications Act"). But see, e.g., BellSouth Comments at 10 (stating that "if a service is deemed to be an 'information service' under the Communications Act, it must also be classified as an information service under CALEA"); Cingular Comments at 3 (arguing that the "restrictive interpretation of the information services exclusion is unduly narrow and is contrary to CALEA's statutory language and legislative history"); EarthLink Comments at 2 (stating that the Commission "reads the information service exemption out of the statute, and it is clear that such an interpretation is contrary to law"); EFF Comments at 11 (stating that the Commission has "no authority to restrict the statutory definition of information services, and the statute's plain language cannot be superseded by the [Notice's] citation to a vaporous tension"); I&P Comments at 27 (arguing that the Commission is redefining "the term information services to not include any service the NPRM wants to deem a telecommunications carrier").

22. That conclusion is further supported by CALEA's structure. CALEA establishes a general rule that telecommunications carriers (including those covered by the SRP) are subject to CALEA's assistance capability requirements.<sup>69</sup> Information services are an exception to that general rule.<sup>70</sup> It is a well recognized principle of statutory construction that "[w]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions."<sup>71</sup> Accordingly, it is appropriate to give the Information Services Exclusion a narrow construction in order to give full effect to CALEA's general rule.

23. We thus find that the classification of a service as an information service under the Communications Act does not necessarily compel a finding that the service falls within CALEA's Information Service Exclusion.<sup>72</sup> Decisions about the applicability of CALEA must be based on CALEA's definitions alone, not on the definitions in the Communications Act.<sup>73</sup> Equally important, the classification of a service provider as a telecommunications carrier under CALEA's SRP *does not limit* the Commission's options for classifying that provider or service under the Communications Act. We believe that the legal framework we have established in this Order for analyzing the applicability of CALEA to service providers under the SRP provides the clearest path, in a manner most consistent with Congress's intent, for identifying which services and service providers are subject to CALEA under the SRP. In the sections below, we apply this legal framework to providers of facilities-based broadband Internet access and interconnected VoIP services.

#### B. Applicability of CALEA to Broadband Internet Access Services

24. In this section, we find that facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA.<sup>74</sup> In finding these providers to be subject to CALEA under the SRP, we reiterate that we do not disturb the Commission's prior decisions that CALEA unambiguously applies to all "common carriers offering telecommunications services for sale to the public," as so classified under the Communications Act.<sup>75</sup> Thus, to the extent that any facilities-based

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<sup>69</sup> 47 U.S.C. § 1002(a).

<sup>70</sup> 47 U.S.C. § 1002(b)(2)(A).

<sup>71</sup> 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:05 (6<sup>th</sup> ed. 2000); see also *C.I.R. v. Clark*, 489 U.S. 726, 739 (1989) ("In construing [statutory] provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

<sup>72</sup> See *infra* Section III.B.

<sup>73</sup> See *Notice*, 19 FCC Rcd at 15679, para. 8; *Second Report and Order*, 15 FCC Rcd at 7112, para. 13.

<sup>74</sup> As we tentatively concluded in the *Notice*, we define "broadband" as those services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second (kbps) in the last mile, *Notice*, 19 FCC Rcd at 15693, para. 36 n.77, but we also include as "broadband" – for purposes of CALEA only – those services such as satellite-based Internet access services that provide similar functionalities but at speeds less than 200 kbps. We explained in the *Notice* that "facilities-based" meant entities that "provide transmission or switching over their own facilities between the end user and the Internet Service Provider (ISP)." *Id.* at 15693, para. 37, n.79.

<sup>75</sup> See *Second Report and Order*, 15 FCC Rcd at 7111, 7114-15, paras. 10, 17; *Notice*, 19 FCC Rcd at 15695, para. 39. CALEA's Common Carrier Provision, section 102(8)(A), applies to any entity that is a telecommunications carrier under the Communications Act. See 47 U.S.C. § 1001(8)(A) (defining the term (continued . . . )

broadband Internet access service provider chooses to offer such service on a common carrier basis, that provider is subject to CALEA pursuant to section 102(8)(A), the Common Carrier Provision.<sup>76</sup>

25. Applying the legal framework set forth in section III.A above, we determine that facilities-based broadband Internet access providers satisfy each of the three prongs of the SRP: (1) they are providing a switching or transmission functionality; (2) this functionality is a replacement for a substantial portion of the local telephone exchange service, specifically, the portion used for dial-up Internet access; and (3) public interest factors weigh in favor of subjecting broadband Internet access services to CALEA.<sup>77</sup>

#### 1. Broadband Internet Access Service Providers Are “Telecommunications Carriers” Under CALEA

26. *Broadband Internet Access Service Includes Switching or Transmission.* We find that facilities-based broadband Internet access service providers are “engaged in providing wire or electronic communication switching or transmission service” and therefore meet the first prong of the SRP.<sup>78</sup> As discussed above, we interpret the “switching or transmission” component of the SRP broadly to capture not only transmission or transport capabilities, but also new packet-based equipment and functionalities that direct communications to their intended destinations.<sup>79</sup> No commenter suggests that facilities-based broadband Internet access providers do not provide a transmission or transport function. Indeed,

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“telecommunications carrier” as “a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire”).

<sup>76</sup> 47 U.S.C. § 1001(8)(A); see also *Wireline Broadband Internet Access Services Order*, paras. 87-95 (authorizing providers of facilities-based wireline broadband Internet access service to offer the transmission component of such service on a common carrier basis, a non-common carrier basis, or a combination of the two). We note that the Supreme Court recently affirmed the Commission’s decision classifying cable modem service as an information service under the Communications Act rather than as a separate information service and telecommunications service. *NCTA v. Brand X*, slip op. at 14-31. In reaching its decision, however, the Court recognized that cable modem service does contain a telecommunications transmission component that is integrated with the information service capability. *Id.* at 18-19. Thus, cable modem service is subject to CALEA under the SRP. As discussed in detail herein, the underlying transmission component of cable modem broadband Internet access service falls squarely within CALEA’s SRP and therefore is subject to CALEA’s requirements pursuant to section 102(8)(B)(ii). 47 U.S.C. § 1001(8)(B)(ii). Consistent with the Supreme Court’s opinion in *NCTA v. Brand X*, the Commission has determined that wireline broadband Internet access services are also information services having a telecommunications component under the Communications Act. *Wireline Broadband Internet Access Services Order*, para. 5. Although facilities-based wireline broadband Internet access providers were formerly required to offer the underlying telecommunications transmission component (*i.e.*, the DSL transport) of their Internet access service to ISPs on a common carrier basis, the Commission has eliminated that requirement. *Wireline Broadband Report and Order*, para. 7. This decision has no bearing on the obligation of facilities-based wireline broadband Internet access providers to comply with CALEA, however, because even if they no longer fall under CALEA’s Common Carrier Provision, they are nonetheless subject to CALEA under the SRP.

<sup>77</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>78</sup> The first prong of the SRP states that a person will be deemed a “telecommunications carrier” if the “person or entity [is] engaged in providing wire or electronic communication switching or transmission service.” 47 U.S.C. § 1001(8)(B)(ii).

<sup>79</sup> See *supra* para. 11.

commenters providing broadband Internet access service today describe the underlying transport component of their service as “switching and forwarding data.”<sup>80</sup>

27. *Broadband Internet Access Service Replaces a Substantial Portion of the Local Telephone Exchange Service.* We next conclude that facilities-based broadband Internet access service providers provide a replacement for a substantial portion of the local telephone exchange service, specifically, the portion of local telephone exchange service that provides subscribers with dial-up Internet access capability.<sup>81</sup> We base this conclusion on Congress’s understanding of the reach of CALEA’s capability at the time the statute was enacted, the purpose for which the statute was enacted, and the support we find in the record for this conclusion.

28. Broadband Internet access service unquestionably “replaces” a portion of the functionality that the traditional local telephone exchange service provides – namely, the ability to access the Internet. CALEA’s legislative history supports our conclusion that broadband Internet access service was intended to be covered by CALEA, as are both dial-up and common carrier DSL transport services. That history explains the distinction between the portion of e-mail service that was subject to CALEA (a service that was accessible only over the Internet)<sup>82</sup> and the portion that was not.<sup>83</sup> The only way that the “transmission of an E-mail message” could have been captured under CALEA in 1994 was through the dial-up facilities and capabilities of narrowband local telephone exchange service.<sup>84</sup> Thus, to the extent that dial-up capabilities are “replaced” today by broadband Internet access service, we ensure that the “transmission of an E-mail message” continues to be subject to CALEA by finding that the SRP covers the transmission component of broadband Internet access service.

29. Other language in the *House Report* also supports our conclusion that CALEA applies to broadband transmission:

While the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications carried over

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<sup>80</sup> Verizon Comments at 9; see also DOJ Reply at 12 (stating that “the Commission properly applied the meaning of the term adopted by Congress to today’s technologies”).

<sup>81</sup> 47 U.S.C. § 1001(8)(B)(ii). As explained above, we reject the notion that the word “replacement” in the SRP should be interpreted as requiring some sort of economic concept of “substitutability.” See *supra* para. 11 n.33; Notice, 19 FCC Rcd at 15699-15701, para. 44 & n.113. Instead, we interpret the term to mean a functional substitute, i.e., a service that provides the subscriber a functionality encompassed within local telephone exchange service.

<sup>82</sup> We acknowledge the existence of private e-mail systems within certain businesses or organizations that exist for the purpose of e-mail communications between employees or members of those organizations. These types of e-mail systems, however, fall within section 103(b)(2)(B)’s exclusion for private networks. *House Report*, 1994 U.S.C.C.A.N at 3503.

<sup>83</sup> See *House Report*, 1994 U.S.C.C.A.N at 3503 (“The storage of a message in a voice mail or E-mail box is not covered by the bill. The redirection of the voice mail message to the box and the transmission of an E-mail message to an enhanced service provider that maintains the E-mail service are covered.”).

<sup>84</sup> See *supra* para. 11.

the Internet are subject to interception under Title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act. *The bill recognizes, however, that law enforcement will most likely intercept communications over the Internet at the same place it intercepts other electronic communications: at the carrier that provides access to the public switched network.*<sup>85</sup>

This language shows that Congress intended Internet *access* to be covered by CALEA.

30. Finally, the *House Report* provides that “a carrier providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements.”<sup>86</sup> We attach particular significance to the fact that the *House Report* language does not say “the publicly switched telephone network,” which is generally understood to mean the traditional telephone network. Rather, it refers to “a publicly switched network,” which also describes the Internet backbone network for purposes of CALEA. Indeed, commenters assert that “the PSTN is not the only publicly switched network: the Internet is another.”<sup>87</sup>

31. In view of Congress’s understanding that entities providing *access* to the Internet and to ISP functionalities in 1994 would be subject to CALEA, we interpret the statute to reach the comparable access functions provided by today’s broadband Internet access service providers. Permitting technological developments and advancements to *remove* services or functionalities from CALEA’s coverage that were previously subject thereto would be directly at odds with Congress’s stated purpose that CALEA is meant “to *preserve* the government’s ability . . . to intercept communications involving advanced technologies” and “to insure that law enforcement can continue to conduct authorized wiretaps in the future.”<sup>88</sup>

32. *Public Interest Factors Weigh in Favor of Subjecting Broadband Internet Access Service to CALEA.* We further find that it is in the public interest to deem facilities-based broadband Internet access service providers to be “telecommunications carriers” for purposes of CALEA under the SRP. The public interest factors that we consider in reaching this determination – the effect on competition, the development and provision of new technologies and services, and public safety and national security – on balance, support this finding.<sup>89</sup>

33. One of the cornerstones of the Commission’s broadband policy is achieving the goal of developing a consistent regulatory framework across all broadband platforms by treating providers in the

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<sup>85</sup> *House Report*, 1994 U.S.C.C.A.N. at 3504 (emphasis added).

<sup>86</sup> *Id.* at 3503.

<sup>87</sup> DOJ Reply at 16; *see also* USTA Reply at 3. Thus, we disagree with commenters who claim that the SRP applies only to the PSTN. *See, e.g.*, Cingular Comments at 9; EDUCAUSE Comments at 8; I&P Comments at 16; I&P Reply at 5-6.

<sup>88</sup> *House Report*, 1994 U.S.C.C.A.N. at 3489 (emphasis added).

<sup>89</sup> *See generally supra* para. 14 (specifically identifying the three public interest factors – to “promote competition, encourage the development of new technologies, and protect public safety and national security” – which CALEA’s legislative history indicates the Commission shall consider).



same manner with respect to broadband services providing similar functionality.<sup>90</sup> Because all facilities-based providers of broadband Internet access services will be covered by CALEA, our finding today will have no skewing effect on competition.<sup>91</sup> In addition, covering all broadband Internet access service providers prevents migration of criminal activity onto less regulated platforms.<sup>92</sup>

34. We further determine that our actions today will not hinder the development of new services and technologies. While our action today brings much needed certainty to the application of CALEA to the development of new services and technologies, it does not favor any particular technology over another. Furthermore, nothing in this item will substantially change the deployment incentives currently faced by providers. Broadband Internet access service providers today are already subject to a number of electronic surveillance statutes that compel their cooperation with law enforcement agencies.<sup>93</sup> In addition, it has been over a year since the Commission issued its tentative conclusion that broadband Internet access service providers would be covered by CALEA. During that time, we have seen an increase in broadband build-out, undermining any arguments that development of these systems would be stifled.<sup>94</sup> In contrast, many commenters have indicated they are currently cooperating with law enforcement agencies to provide CALEA-like capabilities today.<sup>95</sup>

<sup>90</sup> Cf. *Wireline Broadband NPRM*, 17 FCC Rcd at 3023, para. 6 (“[T]he Commission will strive to develop an analytical framework [for broadband Internet access] that is consistent, to the extent possible, across multiple platforms.”).

<sup>91</sup> *Notice*, 19 FCC Rcd at 15704, para. 48. Indeed, as noted by commenters, the fact that CALEA obligations were attached to common carrier DSL transport services but not to cable modem or other types of broadband Internet access services causes competitive distortions that make no policy sense. See Verizon Comments at 10; Letter from Paul Brigner, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-295, at 2 (filed July 20, 2005) (stating that “to the extent CALEA applies to broadband access services, it must apply equally – no cable modem carve-out”); see also SBC Comments at 7 (stating that “the Commission must ensure that the application of CALEA is competitively neutral . . . [a]ll service providers, regardless of the platform they use to deliver the services (i.e., cable, DSL, wireless, satellite, powerline), should be subject to the same CALEA obligations”); DOJ Comments at 17 (stating that promoting competition includes ensuring that CALEA is applied on a competitively and technologically neutral basis); NTCA Comments at 3 (stating that any type of broadband Internet access service, regardless of platform, should be equally subject to CALEA).

<sup>92</sup> See, e.g., NTCA Comments at 3 (stating that “to conclude otherwise would not only be contrary to the law’s intent, it would permit and encourage those with motive to avoid law enforcement’s prying eyes by turning to new technologies”); Spitzer Comments at 2-3 (explaining that among those increasingly using packet-mode and IP based services will be criminals and terrorists); Verizon Comments at 10 (arguing that CALEA should be applied to all broadband access providers because to do otherwise would “enable individuals to avoid electronic surveillance simply by virtue of what broadband access service they choose”).

<sup>93</sup> See *Notice*, 19 FCC Rcd at 15696, para. 39 n.89; see also BellSouth Reply at 2-3; SBC Comments at 3-6.

<sup>94</sup> Advanced service lines of all technology types increased by 42% to 28.9 million lines, during the year 2004. See *Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, Public Notice, (rel. July 7, 2005); *High-Speed Services for Internet Access: Status as of December 31, 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau, July 2005.

<sup>95</sup> See, e.g., OPASTCO Comments at 3 (stating that many small independent LECs that provide advanced services are already in compliance with CALEA); NCTA Comments at 2 (stating that the cable industry has met all of the FBI’s needs with regard to VoIP, and regardless of the ultimate holding on the applicability of CALEA to cable modem, the cable industry stands ready to work with law enforcement agencies to meet their surveillance needs).

35. The overwhelming importance of CALEA's assistance capability requirements to law enforcement efforts to safeguard homeland security and combat crime weighs heavily in favor of the application of CALEA obligations to all facilities-based broadband Internet access service providers. Indeed, efforts to protect the United States from terrorist attacks and other national security threats may be more critical today than ever contemplated by Congress at the time CALEA was enacted. It is clearly not in the public interest to allow terrorists and criminals to avoid lawful surveillance by law enforcement agencies by using broadband Internet access services as a substitute for dial-up service. Commenters almost unanimously recognize and support law enforcement's ability to protect public safety and national security against domestic and foreign threats.<sup>96</sup> As noted by one commenter, "nearly every service provider and vendor or their representative organizations filing comments in this proceeding recognized the importance of providing real-time forensic evidence support capabilities for law enforcement that constitutes the purpose of CALEA."<sup>97</sup> We conclude that the application of CALEA to all facilities-based broadband Internet access services will assist law enforcement agencies in their vitally important national security role.<sup>98</sup>

36. Finally, in finding CALEA's SRP to cover facilities-based providers of broadband Internet access service, we conclude that establishments that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet from their respective

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<sup>96</sup> See, e.g., CTIA Reply at 2 (supporting "the goal of providing Law Enforcement the surveillance capability Congress intended when it enacted CALEA in 1994"); SIA Comments at 1-2 (stating that it supports "the Commission's objective in this proceeding to implement CALEA fully and to ensure law enforcement's continued ability to surveil packet-mode communications that are within the ambit of CALEA"); TIA Comments at 1 (stating that "law enforcement must have effective capabilities to conduct lawful surveillance of communications in order to fight crime and terrorism"); USTA Comments at 1 (stating that it "is committed to working with law enforcement to create CALEA compliant wiretap solutions for advanced telecommunications technologies that thwart crime and terrorism").

<sup>97</sup> VeriSign Reply at 2.

<sup>98</sup> Based on our analysis here, we decline to exclude any facilities-based broadband Internet access providers from CALEA requirements at this time. A number of commenters claim that small entities providing broadband Internet access service or entities that provide broadband Internet access service in rural areas do not meet the SRP's public interest standard. See, e.g., NTCA Comments at 3-5 (stating that "a proper public interest analysis should exempt small businesses providing broadband access"); RTG Comments at 2-3 (arguing that rural carriers must be excluded from the SRP because "such an exclusion is in the public interest"); UPLC Reply at 10 (stating that applying CALEA to BPL services "would not serve the public interest, certainly not without more time to comply"). We agree with DOJ that these commenters have not provided sufficient evidence, identified the particular carriers that should be exempted from CALEA's SRP, or addressed law enforcement's needs. See DOJ Reply at 21-22 (stating that it will not "support a broad exemption for any class of carriers under the public-interest clause of the SRP . . . or any other provision in the absence of a clear definition of the scope of carriers that would be covered or without clearly identified and sufficient means of addressing the needs of law enforcement and protecting privacy"). We note that these telecommunications carriers have several options under CALEA. See, e.g., 47 U.S.C. § 1001(8)(C)(ii) (authorizing the Commission, after consultation with the Attorney General, to exempt a class or category of carriers from CALEA); 47 U.S.C. § 1008(b)(1) (establishing a limited cost reimbursement mechanism for carriers for whom CALEA compliance is not "reasonably achievable"). Additionally, in the *Further Notice*, we seek comment on what procedures we should adopt to implement CALEA's exemption provision, as well as the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, such as small or rural entities. We also seek comment on the best way to impose different compliance standards. See *infra* Part IV.

establishments are not considered facilities-based broadband Internet access service providers subject to CALEA under the SRP.<sup>99</sup> We note, however, that the provider of underlying facilities to such an establishment would be subject to CALEA, as discussed above. Furthermore, providers of Personal Area Networks (e.g., cordless phones, PDAs, home gateways) are not intended to be covered by our actions today. We find that these services are akin to private networks, which are excluded from CALEA requirements.<sup>100</sup>

## **2. CALEA's Information Services Exclusion Does Not Apply to Broadband Internet Access Providers**

37. We find that providers of broadband Internet access service are not relieved of CALEA obligations as a result of CALEA's Information Services Exclusion. As we have noted, our interpretation of the term information services in CALEA differs from our interpretation of that term in the Communications Act.<sup>101</sup> Thus, the fact that broadband Internet access service may be classified as an information service under the Communications Act does not determine its classification for CALEA purposes.<sup>102</sup> The appropriate focus of our analysis must be on the meaning of the term in CALEA, and for that, as we have explained, we look to the text of CALEA and its legislative history for guidance.<sup>103</sup> As noted above, the legislative history indicates that under CALEA, telecommunications components are separable for regulatory purposes from information service components within a single service.<sup>104</sup>

38. Our interpretation of the relationship between information services under the Communications Act and the Information Services Exclusion under CALEA does not eviscerate the Information Services

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<sup>99</sup> See *Notice*, 19 FCC Rcd at 15704, para. 48 n.133. Examples of these types of establishments may include some hotels, coffee shops, schools, libraries, or book stores. DOJ has stated that it "has no desire to require such retail establishments to implement CALEA solutions," DOJ Comments at 36, and we conclude that the public interest at this time does not weigh in favor of subjecting such establishments to CALEA.

<sup>100</sup> See 47 U.S.C. § 1002(b)(2)(B); see also *House Report*, 1994 U.S.C.C.A.N. at 3498; *Second Report and Order*, 15 FCC Rcd at 7112, para. 12; *Notice*, 19 FCC Rcd at 15679, para. 8. Relatedly, some commenters describe their provision of broadband Internet access to specific members or constituents of their respective organizations to provide access to private education, library and research networks, such as Internet2's Abilene Network, NysNet, and the Pacific Northwest gigaPoP. See, e.g., EDUCAUSE Comments at 22-25. To the extent that EDUCAUSE members (or similar organizations) are engaged in the provision of facilities-based private broadband networks or intranets that enable members to communicate with one another and/or retrieve information from shared data libraries not available to the general public, these networks appear to be private networks for purposes of CALEA. Indeed, DOJ states that the three networks specifically discussed by EDUCAUSE qualify as private networks under CALEA's section 103(b)(2)(B). DOJ Reply at 19. We therefore make clear that providers of these networks are not included as "telecommunications carriers" under the SRP with respect to these networks. To the extent, however, that these private networks are interconnected with a public network, either the PSTN or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP.

<sup>101</sup> See *supra* para. 9.

<sup>102</sup> See *supra* n.76.

<sup>103</sup> See *supra* para. 21.

<sup>104</sup> See *supra* paras. 15-19; *House Report*, 1994 U.S.C.C.A.N. at 3503.

Exclusion, as certain commenters claim.<sup>105</sup> Rather, this approach gives meaning to the Information Services Exclusion, as intended by Congress, while reconciling the fact that Congress included the SRP specifically to empower the Commission to bring services such as broadband Internet access within CALEA's reach if appropriate. A facilities-based broadband Internet access service provider continues to have *no* CALEA obligations with respect to, for example, the storage functions of its e-mail service, its web-hosting and DNS lookup functions or any other ISP functionality of its Internet access service. It is only the "switching and transmission" component of its service that is subject to CALEA under our finding today.<sup>106</sup>

### C. Applicability of CALEA to VoIP Services

39. We conclude that CALEA applies to providers of "interconnected VoIP services." As defined in our recent *VoIP E911 Order*,<sup>107</sup> interconnected VoIP services include those VoIP services that:

(1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN.<sup>108</sup> We find that providers of interconnected VoIP services satisfy CALEA's definition of "telecommunications carrier" under the SRP and that CALEA's Information Services Exclusion does not apply to interconnected VoIP services. To be clear, a service offering is "interconnected VoIP" if it offers the *capability* for users to receive calls from and terminate calls to the PSTN; the offering is covered by CALEA for all VoIP communications, even those that do not involve the PSTN. Furthermore, the offering is covered regardless of how the interconnected VoIP provider facilitates access to and from the PSTN, whether directly or by making arrangements with a third party.

40. In reaching our conclusion, we abandon the distinction the *Notice* drew between "managed" and "non-managed" VoIP services as the dividing line between VoIP services that are covered by CALEA and those that are not.<sup>109</sup> The record has overwhelmingly convinced us that this distinction is unadministrable,<sup>110</sup> even DOJ expressed an openness to a different way of identifying those VoIP services that CALEA covers.<sup>111</sup> We find that using "interconnected VoIP services" to define the category

<sup>105</sup> BellSouth Comments at 5-12; Cingular Comments at 10-17; CTIA Comments at 4-5; EarthLink Comments at 3-5; EarthLink Reply at 8-9; EFF Comments at 9-12; Global Crossing Comments at 2-9; I&P Reply at 25; Motorola Comments at 7; Southern LINC Reply at 3-4; T-Mobile Comments at 9-12; UPLC Reply at 8.

<sup>106</sup> DOJ Reply at 16.

<sup>107</sup> *IP-Enabled Services*, WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, at paras. 3-5, 36-53 (rel. June 3, 2005) (*VoIP E911 Order*), petitions for review pending, *VoicePulse, Inc. v. FCC*, No. 05-1247 (D.C. Cir. filed July 11, 2005) and *Nuvio Corporation v. FCC*, No. 05-1248 (D.C. Cir. filed July 11, 2005).

<sup>108</sup> *Id.* To the extent that the Commission modifies its definition of interconnected VoIP in the future, the CALEA obligations we establish today for interconnected VoIP providers will reflect such modifications. *Cf. VoIP E911 Order*, para. 58 (seeking comment on whether E911 obligations should be extended to other types of VoIP services). We acknowledge that the concept of "PSTN" is one that can evolve over time.

<sup>109</sup> *Notice*, 19 FCC Rcd at 15693-95, para. 37.

<sup>110</sup> *See, e.g.*, SBC Comments at 9-10; US ISPA Comments at 13-15; USTA Comments at 4 n.7; Verizon Comments at 9-10; I&P Reply at 12-13.

<sup>111</sup> DOJ Reply at 13-14.

of VoIP services that are covered by CALEA provides a clearer, more easily identifiable distinction that is consistent with recent Commission orders addressing the appropriate regulatory treatment of IP-enabled services.<sup>112</sup> Interconnected VoIP services today include many of the types of VoIP offerings that DOJ's Petition indicates should be covered by CALEA, and is thus responsive to DOJ's needs at this time.<sup>113</sup>

### 1. Interconnected VoIP Providers Are "Telecommunications Carriers" Under CALEA

41. *Interconnected VoIP Includes Switching or Transmission.* We find that providers of interconnected VoIP satisfy the three prongs of the SRP under CALEA's definition of "telecommunications carrier."<sup>114</sup> First, these providers are "engaged in providing wire or electronic communication switching or transmission services."<sup>115</sup> As we have explained, we interpret the term "switching" in the CALEA definition of "telecommunications carrier" to include "routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations."<sup>116</sup> Interconnected VoIP service providers use these technologies to enable their subscribers to make, receive, and direct calls.<sup>117</sup> The record reflects that any VoIP provider that is interconnected to the PSTN "must necessarily" use a router or other server to do so.<sup>118</sup> Thus, even VoIP providers that do not own their own underlying transmission facilities nonetheless are engaged in providing "switching" services to their customers.<sup>119</sup>

42. *Interconnected VoIP Replaces a Substantial Portion of the Local Telephone Exchange Service.* Second, interconnected VoIP satisfies the "replacement for a substantial portion of the local telephone exchange service"<sup>120</sup> prong of the SRP because it replaces the legacy POTS service functionality of traditional local telephone exchange service. As we explained in the *VoIP E911 Order*, customers who purchase interconnected VoIP service receive a service that "enables a customer to do everything (or nearly everything) the customer could do using an analog telephone."<sup>121</sup> Indeed, the urgency with which

<sup>112</sup> See generally *VoIP E911 Order*, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), *appeal pending*, *National Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-71238 (9th Cir. filed Feb. 22, 2005).

<sup>113</sup> In the *Further Notice*, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. See *infra* Part IV.

<sup>114</sup> 47 U.S.C. § 1001(8)(B)(ii); see also *supra* Section III.A.

<sup>115</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>116</sup> *Notice*, 19 FCC Rcd at 15698-99, para. 43 (footnote omitted); see also *supra* para. 12.

<sup>117</sup> *Notice*, 19 FCC Rcd at 15708-09, para. 56; VeriSign Comments at 5-6.

<sup>118</sup> DOJ Comments at 33; see also Verizon Reply at 8.

<sup>119</sup> See *supra* para. 11.

<sup>120</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>121</sup> *VoIP E911 Order*, para. 23 (footnote omitted).

the Commission recently addressed 911 requirements for interconnected VoIP was largely related to incidents where consumers had abandoned legacy POTS service in favor of interconnected VoIP.<sup>122</sup> We determine that a service that is increasingly used to replace analog voice service is exactly the type of service that Congress intended the SRP to reach. Moreover, commenters offer no evidence to dispute the use of interconnected VoIP to obtain voice service capability, among other features.

43. *Public Interest Factors Weigh in Favor of Subjecting Interconnected VoIP Providers to CALEA.* Finally, we find that it is in the public interest to deem an interconnected VoIP service provider a telecommunications carrier for purposes of CALEA. In reaching this conclusion, we examine the three prongs of the public interest analysis that the *Notice* proposed to consider: promotion of competition, encouragement of the development of new technologies, and protection of public safety and national security.<sup>123</sup> These three factors compel a finding that CALEA should apply to interconnected VoIP. First, our finding today will not have a deleterious effect on competition because all providers of interconnected VoIP will be covered by CALEA. Singling out certain technologies or categories of interconnected VoIP providers would be more harmful to competition than applying CALEA requirements to all providers of interconnected VoIP services, as we do today.<sup>124</sup> Second, we are confident that our decision today will not discourage the development of new technologies and services. Interconnected VoIP providers are already obligated to cooperate with law enforcement agencies under separate electronic surveillance laws.<sup>125</sup> We have seen no evidence that these requirements have deterred the development of new VoIP technologies and services in the period of time since the Commission issued its tentative conclusion that some types of VoIP service are covered by CALEA. Instead, we have seen an increasing effort on the part of many interconnected VoIP providers to develop CALEA capabilities, and the record indicates that VoIP providers are already modifying their operations to ensure that they are able to comply with CALEA.<sup>126</sup> Industry solutions appear to be readily available.<sup>127</sup>

44. Finally, the protection of public safety and national security compels us to apply CALEA to interconnected VoIP service providers. The *Notice* indicated, and the record confirms, that excluding interconnected VoIP from CALEA coverage could significantly undermine law enforcement's surveillance efforts. The *Notice* explained, and commenters agreed, that broadband Internet access

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<sup>122</sup> *Id.*, para. 1 n.2.

<sup>123</sup> 47 U.S.C. § 1001(8)(B)(ii); *see also supra* para. 14.

<sup>124</sup> *See supra* Section III.B.

<sup>125</sup> *See* I&P Comments at 4-5 & n.5 (explaining that Internet-based communications can be intercepted under the Omnibus Crime Control and Safe Streets Act, the Electronic Communications Privacy Act, and the Foreign Intelligence Surveillance Act).

<sup>126</sup> *See* Level 3 Comments at 2 ("Level 3 has made great progress toward bring its wholesale VoIP services into compliance with the requirements of CALEA."); *VeriSign NetDiscovery Services Selected by Vonage* (press release) (Mar. 8, 2005) <[http://www.verisign.com/press\\_releases/pr/page\\_028679.html](http://www.verisign.com/press_releases/pr/page_028679.html)> (announcing that Vonage has enlisted VeriSign to help incorporate CALEA capabilities into its VoIP services).

<sup>127</sup> *See* Fiducianet Comments at 15-20 (describing the CALEA solutions Fiducianet currently offers to providers of broadband Internet access and VoIP services); VeriSign Comments at 16 (noting the "ready availability [to providers of VoIP and broadband Internet access services] of high-performance, reasonably priced adjunct devices capable of supporting law enforcement needs").

providers alone might not have reasonable access to all of the information that law enforcement needs.<sup>128</sup> Specifically, call management information (such as call forwarding and conference call features) and call set-up information (such as real-time speed dialing information and post-dial digit extraction information) are unlikely to be reasonably available to a broadband Internet access provider.<sup>129</sup> The record thus indicates that the broadband Internet access provider and the interconnected VoIP provider must both be covered by CALEA in order to ensure that law enforcement agencies' surveillance needs are met. These considerations convince us that applying CALEA to interconnected VoIP service providers is in the public interest.

## 2. CALEA's Information Services Exclusion Does Not Apply to Interconnected VoIP

45. We find that interconnected VoIP service is not subject to the Information Services Exclusion in CALEA. The regulatory classification of interconnected VoIP under the Communications Act is not determinative with regard to this inquiry. Indeed, the Commission has yet to determine the statutory classification of providers of interconnected VoIP for purposes of the Communications Act,<sup>130</sup> but nowhere does CALEA require such a determination before analyzing a service provider under the SRP. Instead, the appropriate focus is on the meaning of the term in CALEA, and for that, as we have noted, we must again look to the text and legislative history of CALEA for guidance.<sup>131</sup> As we have explained, the legislative history contains much discussion of "information services," but not once did Congress contemplate that any type of voice service would fall into that category.<sup>132</sup> Most significantly, Congress explicitly distinguished between "information services" that are not covered by CALEA and "services or facilities that *enable the subscriber to make, receive or direct calls*," which are covered.<sup>133</sup> Congress intended the capability to make what appear to the consumer to be ordinary voice calls – regardless of the technology involved – to fall outside the category of excluded information services under CALEA.<sup>134</sup> To the extent that commenters question the appropriateness of applying CALEA to interconnected VoIP services because they believe that interconnected VoIP is an information service under the Communications Act, we strongly disagree. Charged with implementing CALEA and given the discretion contained in the public interest prong of the SRP to extend CALEA obligations to service

<sup>128</sup> Notice, 19 FCC Rcd at 15708-09, para. 56; NCTA Comments at 5-6; VeriSign Comments at 12.

<sup>129</sup> Notice, 19 FCC Rcd at 15708-09, para. 56; *see also* VeriSign Comments at 12 (stating that certain "real-time traffic data" is not available to the broadband Internet access provider and thus can be accessed only through the VoIP provider).

<sup>130</sup> *See VoIP E911 Order*, para. 26.

<sup>131</sup> *See supra* Section III.A.

<sup>132</sup> *See id.*

<sup>133</sup> *House Report*, 1994 U.S.C.C.A.N. at 3503 (emphasis added).

<sup>134</sup> We note that commenters who urged us to classify VoIP as an information service for purposes of CALEA relied on the similar language used in the CALEA and Communications Act definitions of that term. *See, e.g.,* BellSouth Comments at 5-12; Cingular Comments at 5-9; EarthLink Comments at 5-7. As we have explained, we cannot rely solely on similarities in the plain statutory language when analyzing services under CALEA, and commenters offered no other convincing justifications for treating VoIP services as information services for CALEA purposes. *See supra* Section III.A.

providers that both meet the SRP and provide a service that Congress explicitly understood would be subject to CALEA, we cannot reasonably decline to find interconnected VoIP service providers subject to CALEA simply because these services may, at some future time, be classified as information services under the Communications Act.

#### D. Scope of Commission Action

46. Our action in this Order is limited to establishing that CALEA applies to facilities-based broadband Internet access providers and interconnected VoIP service providers.<sup>135</sup> The *Notice* raised important questions regarding the ability of broadband Internet access providers and VoIP providers to provide all of the capabilities that are required by section 103 of CALEA, including what those capability requirements mean in a broadband environment.<sup>136</sup> The *Notice* also sought comment on a variety of issues relating to identification of future services and entities subject to CALEA, compliance extensions, cost recovery, and enforcement.<sup>137</sup> We will address all of these matters in a future order. Because we acknowledge that providers need a reasonable amount of time to come into compliance with all relevant CALEA requirements, we establish a deadline of 18 months from the effective date of this Order, by which time newly covered entities and providers of newly covered services must be in full compliance.<sup>138</sup>

47. We believe that addressing applicability issues now is the best approach to commencing productive discussions between law enforcement agencies and the industry as they work together to develop capability solutions that providers are reasonably able to achieve, and that are responsive to law enforcement's needs. By identifying the providers that are covered today, we seek to ensure that the appropriate industry representatives will be party to those discussions. Nearly every commenter acknowledges the importance of assisting law enforcement agencies with their surveillance needs. We are therefore confident that the service providers covered by this Order will waste no time in investigating how they can best respond to law enforcement's needs.<sup>139</sup>

<sup>135</sup> *Notice*, 19 FCC Rcd at 15703, 15708-09, paras. 47, 56.

<sup>136</sup> *Id.* at 15712-14, paras. 63-68. The *Notice* also raised questions about the use of compliance solutions employing "trusted third parties" or based on CALEA's "safe harbor" standards. *Id.* at 15714-19, paras. 69-76, 77-85.

<sup>137</sup> *Id.* at 15710-11, 15720-30, 15734-42, paras. 60-61, 87-110, 117-40.

<sup>138</sup> *See id.* at 15742-43, paras. 140-43 (seeking comment on the appropriate amount of time to give newly covered entities to comply with CALEA). Many commenters argued that newly identified entities should be given at least 12-15 months to comply. *See, e.g.*, DOJ Reply at 46 (supporting 12 months for newly identified entities to bring packet-mode networks into compliance); Sprint Reply at 13 (suggesting 15 months as the minimally reasonable amount of time); VeriSign Comments at 40 (arguing that a nationwide deployment would realistically require a 15 month compliance deadline). Some commenters suggested a longer period or additional time for small carriers. *See, e.g.*, BellSouth Comments at 29 (recommending a 24-month compliance period for packet-mode services); SBA Reply at 7 (suggesting that the Commission consider an extended compliance period for small carriers); Southern LINC Reply at 6 (stating that a period of two years is a reasonable amount of time). We find that, based on the record, 18 months is a reasonable time period to expect all providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with CALEA.

<sup>139</sup> As noted above, the record indicates that many of these providers are already building CALEA capabilities into their networks and operations. *See supra* paras. 34-43.



#### IV. FURTHER NOTICE OF PROPOSED RULEMAKING

48. In this *Further Notice*, we seek comment on two aspects of the conclusions we reach in today's Order. First, with respect to interconnected VoIP, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services.<sup>140</sup> Specifically, are there any types of "managed" VoIP service<sup>141</sup> that are not covered by today's Order, but that should be subject to CALEA?

49. Second, some commenters in this proceeding have argued that certain classes or categories of facilities-based broadband Internet access providers – notably small and rural providers and providers of broadband networks for educational and research institutions – should be exempt from CALEA.<sup>142</sup> We reach no conclusions in today's Order about the merits of these arguments, as we believe that additional information is necessary before reaching a decision.<sup>143</sup> In this *Further Notice*, we seek comment on what procedures, if any, the Commission should adopt to implement CALEA's exemption provision.<sup>144</sup> In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards.

50. Section 102(8)(C)(ii) of CALEA<sup>145</sup> provides the Commission with authority to grant exemptions from CALEA for entities that would otherwise fall within the definition of "telecommunications carrier" under section 102(8)(A) or (B).<sup>146</sup> Specifically, section 102(8)(C)(ii) excludes from CALEA's definition of telecommunications carrier "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General."<sup>147</sup> The Commission has never exempted telecommunications carriers under this provision, nor has it adopted specific procedures for doing so. We therefore seek comment on what procedures, if any, the Commission should adopt for exempting entities under section 102(8)(C)(ii). In particular, we seek comment on how the phrase "by rule" should be interpreted. In addition, CALEA's exemption provision requires "consultation with the Attorney General."<sup>148</sup> The Commission has implemented other statutory provisions requiring consultation with the

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<sup>140</sup> Cf. *VoIP E911 Order*, para. 58 (seeking comment on whether E911 obligations should be extended to other types of VoIP services).

<sup>141</sup> See *supra* para. 40.

<sup>142</sup> See Smithville Comments at 1-2 (arguing that small broadband access providers in rural areas should be exempted from CALEA under section 102(8)(C)(ii)); EDUCAUSE Comments at 22-28 (arguing that private broadband networks used by schools, libraries, and research institutions should be exempt from CALEA requirements).

<sup>143</sup> See *supra* n.98.

<sup>144</sup> 47 U.S.C. § 1001(8)(C)(ii). DOJ has recognized that exemptions may be appropriate for certain entities and has indicated a willingness to evaluate such requests. DOJ Reply at 20 ("If a party to this proceeding can articulate a well-defined category of institutions, services and/or measures taken to protect the public safety and national security concerns of law enforcement that would merit exception from CALEA's requirements, DOJ would be willing to evaluate such a proposal.").

<sup>145</sup> 47 U.S.C. § 1001(8)(C)(ii).

<sup>146</sup> 47 U.S.C. § 1001(8)(A) and (B).

<sup>147</sup> 47 U.S.C. § 1001(8)(C)(ii).

<sup>148</sup> *Id.*

Attorney General and we ask commenters to consider whether we should interpret “consultation” for purposes of CALEA in a similar manner considering the unique expertise of the Attorney General’s office in combating crime, supporting homeland security, and conducting electronic surveillance.<sup>149</sup>

51. To the extent that the Commission determines that a class or category of providers is exempt under section 102(8)(C)(ii), does that mean the class or category of telecommunications carriers is exempted indefinitely from CALEA compliance? Can or should the Commission limit the exemption for a certain period of time, requiring exempted entities to demonstrate that continued exemption is warranted at some future time? Commenters should consider these and any other issues that may be relevant to granting an exemption request.

52. Commenters addressing exemptions from CALEA understandably focused on section 102(8) of CALEA, which authorizes the Commission to exclude providers from the definition of telecommunications carrier.<sup>150</sup> But our examination of the record has made us curious about the possibility of taking a different approach to this issue.<sup>151</sup> Specifically, we seek comment on whether it might be preferable to define the requirements of CALEA differently for certain classes of providers, rather than exempting those providers from CALEA entirely. Does the Commission have authority to create different compliance requirements for different types of providers? Would this approach be consistent with the language of the statute? Would it satisfy the needs of law enforcement, as well as the classes of providers seeking exemptions? What advantages and disadvantages would this approach have compared to granting exemptions under section 102(8)(C)?

## V. PROCEDURAL MATTERS

### A. *Ex Parte* Presentations

53. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>152</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the

<sup>149</sup> For example, section 271(d)(2)(A) of the Communications Act requires the Commission to consult with the Attorney General before making any determination approving or denying a section 271 application. 47 U.S.C. § 271(d)(2)(A). The Attorney General is entitled to evaluate the application “using any standard the Attorney General considers appropriate,” and the Commission is required to “give substantial weight to the Attorney General’s evaluation.” *Id.* The Commission has deemed this consultation requirement to be satisfied through consideration of the Attorney General’s filed comments on the BOC’s section 271 application. *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3964-66, paras. 24-27 (1999).

<sup>150</sup> *See* 47 U.S.C. § 1001(8)(C)(ii) (excluding from the definition of telecommunications carrier “any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General”); 47 U.S.C. § 1001(8)(B)(ii) (requiring that a Commission determination that a provider satisfies the SRP must be in the public interest).

<sup>151</sup> *See, e.g.,* DOJ Reply at 21 (suggesting that DOJ might be satisfied with something less than full CALEA compliance for certain types of providers).

<sup>152</sup> 47 C.F.R. §§ 1.1200 *et seq.*